

BELGIAN RETAIL NEWSLETTER

7 JUNE 2016



BELGIUM | “Pop-up” retail stores in the Flemish Region: soon to be subject to a new, separate legal framework for short-term leasing?

1. INTRODUCTION

A “pop-up” store is not a legally defined term under Belgian law. Rather it is a collective name for quite a recent phenomenon of retail stores that wish to be present on the market for a limited time only (e.g. a few weeks or a few months).

The reasons why retailers choose a short-term presence rather than a long-term presence are diverse: testing the viability of a retail concept before making large investments, opening a store linked to a temporary event, performing a publicity stunt, etc.

Practice shows that parties often struggle to fit the occupation of a pop-up store into an adequate legal framework.

Often, landlords and/or tenants want to avoid that their short-term lease will be (re-)qualified as a commercial lease, which is subject to the mandatory provisions of the Belgian Commercial Lease Act of 30 April 1951. These mandatory provisions include a mandatory minimum term of nine years and the tenant’s right to ask for three lease renewals of nine years each. Landlords often do not wish the application of such a predominantly pro-tenant regime, while pop-up retailers do not wish to be bound by the mandatory minimum term of nine years (which is not compatible with the duration and flexibility required for a pop-up store).¹

This newsletter briefly examines the main possible solutions for fitting a pop-up store in the legal framework of the Commercial Lease Act or in an alternative (lease) regime and also discusses the recent draft Flemish decree regarding short-term retail leases.

¹ It is not excluded that at a given moment, a party changes its mind and wishes to fall under the scope of the Commercial Lease Act (for example, after a few successful months the pop-up retailer could wish to stay for the long term in the property and, therefore, wish to rely on the minimum duration of nine years offered by the Commercial Lease Act).

2. CURRENT POSSIBLE LEGAL FRAMEWORK (LEASE OR OTHER REGIMES) COVERING THE OCCUPATION OF A POP-UP STORE

2.1 Commercial lease

If the pop-up store is subject to the Commercial Lease Act – further to the explicit choice of the parties or further to a requalification of their agreement – the pop-up retailer by law benefits from the right to *terminate the lease for convenience at the end of each three-year period*.² Such early termination is subject to presenting advance notice by registered letter or by bailiff's deed, no later than six months prior to the end of such period. No indemnification or justification is required.

However, pop-up stores typically have a lifespan of only a few months, so this termination right – which implies that the lease has a duration of at least three years – will not provide for enough flexibility to operate a pop-up store.

That being said, the lease may provide a *termination clause which is more beneficial to the tenant* (e.g. a monthly termination option and/or a shorter period for advance notice). Of course, such beneficial regime requires the consent of the landlord.

Another alternative to “avoid” the statutory lease term is for *both parties to mutually agree to terminate the lease prior to its expiry date* (e.g. with effect at the end of the sixth calendar month following the lease start date). Such mutual agreement is to be formalized in a notarial deed or by way of a joint declaration made before the Justice of the Peace during the lease.³

2.2 Alternative regimes

In an attempt to avoid the application of the Commercial Lease Act, parties could – depending on the circumstances of a given case – consider choosing an alternative, more flexible legal framework (in terms of duration, etc.), such as one of the following:

- The “common law on leases” as described in the Civil Code, it being understood that in such case parties bear the burden of proof that the lease does not fall within the scope of the Commercial Lease Act *viz.* that “due to the nature or the intended purpose⁴ of the property or according to custom⁵, the lease is concluded for less than one year” (see art. 2, 1° Commercial Lease Act)⁶. In practice, it may be difficult for parties to prove that these conditions are met.
- A “title of precarious occupation”⁷, meaning that the owner of the property allows the pop-up retailer to use and occupy that property temporarily in return for payment. In such a framework, the *owner* can terminate the contract at any time, subject to a reasonable termination notice. This means that the retailer's occupation right is precarious as it lasts only as long as it pleases the owner. Such framework may be inadequate for a pop-up operator as it does not control the lifespan of its pop-up store.
- A “service agreement” whereby the owner of the property not only allows the pop-up retailer to use the property, but also offers services to the pop-up retailer – e.g. cleaning services, publicity, surveillance, promotion, etc. In order to qualify as a service agreement rather than as a (commercial) lease, it is, among other things, required that the services offered are more important than the occupation of the property. It is questionable if a “service agreement” qualification is feasible for a typical pop-up store.

Even if in a given case parties may have arguments to defend that the occupation of the pop-up store is subject to one of the above alternative regimes (rather than the regime of the Commercial Lease Act), the legal uncertainty of such qualification remains. In other words, in such cases, parties need to accept the possibility that one day their agreement could be requalified as a commercial lease.

² See art. 3 par. 3 Commercial Lease Act.

³ The lease registration duties (typically due by the tenant) will, however, be calculated taking into account the initial lease term (which is at least nine years).

⁴ E.g. a lease in the framework of a temporary event.

⁵ E.g. a lease regarding a beach bar in the summer season.

⁶ This is the so-called “location à caractère saisonnier” (French) or “gelegenheidshuur” (Dutch).

⁷ This is the so-called “occupation à titre précaire” (French) or “bezetting ter bede” (Dutch) which is a type of contract created by case law.

3. DRAFT FLEMISH DECREE ON SHORT-TERM LEASING OF PREMISES FOR COMMERCIAL OR CRAFTSMEN ACTIVITIES

In December 2015, a draft Flemish decree was submitted in the Flemish Parliament aiming at “regulating the short term leasing for commerce and craftsmen activity” regarding immovable property located in the Flemish Region.⁸

Pursuant to the Council of State’s advice dated 18 February 2016, said draft decree was amended on 14 April 2016 (the “Draft Decree”).

The Draft Decree aims at providing a new legal framework – and hence, increased legal certainty – for the following type of lease: (i) the lease of a part or the entirety of immovable property, (ii) which is taken in lease for the operation of a retail or craftsmen activity by the tenant, (iii) with direct contact between the tenant and the public, and (iv) which is explicitly concluded for a *term which is equal to or less than one year* (“short-term lease”).

The Draft Decree contains, among other things, the following provisions:

- a. The short-term lease automatically terminates upon its expiry, without any termination notice to be given and without the tenant having the right to ask for a lease renewal.
- b. Subject to the parties’ consent, the short-term lease can be extended several times under the same conditions, provided that the aggregate duration does not exceed one year.
- c. If, further to such extension(s), the aggregate duration exceeds one year, the short-term lease falls within the scope of the Commercial Lease Act as of the start date of the initial short-term lease.
- d. The tenant is entitled to terminate the short-term lease for convenience at any time, by giving one month’s notice by means of presenting a registered letter or a bailiff deed.
- e. Parties can jointly terminate the short-term lease for convenience at any time, provided that such termination is documented in writing.
- f. The tenant has the right to carry out works that are useful for his business provided that the cost of the works does not exceed the annual rent and the tenant informs the landlord before the start of the works.
- g. The taxes on the premises are deemed to be included in the rent, unless agreed otherwise by parties.
- h. Assignment of the short-term lease and sublease are prohibited.

The Draft Decree raises various questions which remain unanswered at this stage, such as:

- (i) Are the legal provisions of the Draft Decree *mandatory provisions* that cannot be deviated from by contract, or, are they *default provisions* providing for a given standard in the absence of a derogating contractual provision? For example, could the contract provide for more flexible termination modalities for the tenant and/or the landlord than the ones set out in the Draft Decree?
- (ii) What is the relationship between the Draft Decree and the common law on leases (in particular for topics not covered by the Draft Decree)?
- (iii) If the tenant continues to occupy the premises after the end date without the landlord’s objection, is there a tacit renewal of the lease (under the same conditions)?

The Draft Decree will be further discussed in the coming months in the Flemish Parliament’s Commission for Economics and Work.

In the second half of 2016, it should become clear if and when the Draft Decree would become law (as the case may be further to additional text modifications).

⁸ See “Voorstel van decreet houdende huur van korte duur voor handel en ambacht (Parl St. VI. Parl. 2015-16, nr. 598/1)”. Since 1 July 2014, the competence regarding retail leases was transferred from the Belgian federal state to the three Belgian Regions viz. the Flemish Region, the Walloon Region and the Brussels-Capital Region.

4. CONCLUSION

The Belgian Commercial Lease Act imposes a mandatory minimum lease period of nine years, which does not suit pop-up retailers.

There are a limited number of “escape” routes. However, these alternative regimes are not ideal for the pop-up retailer since such regimes either require the consent of both the retailer and the landlord, or do not offer legal certainty.

Hence, the Flemish Parliament is working on a new, separate legal framework covering retail leases that do not exceed one year.

Steven Ongena

Attorney, member of the Brussels Bar
songena@mcguirewoods.com
+32 2 629 42 28
Rue des Colonies 56 - box 3
1000 Brussels

Pol Cools

Attorney, member of the Brussels Bar
pcools@mcguirewoods.com
+32 2 629 42 16
Rue des Colonies 56 - box 3
1000 Brussels

Disclaimer: This newsletter is intended to provide information of general interest to the public and is not intended to offer legal advice about specific situations or problems. This newsletter is based on legislation and draft legislation as publicly available per 2 June 2016. McGuireWoods does not intend to create an attorney-client relationship by offering this information, and anyone’s review of the information shall not be deemed to create such a relationship. You should consult a lawyer if you have a legal matter requiring attention.

© 2016 McGuireWoods LLP

www.mcguirewoods.com